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THE INTERNAL REVENUE SERVICE COLLECTS FROM AN INNOCENT SPOUSE IN *United States v. Craft*:¹ COULD BUSINESS ASSOCIATES BE NEXT?

“So they are no longer two, but one. Therefore what God has joined together, let man not separate.”²

I. INTRODUCTION

In *Blue Canyon Limited v. United States*,³ a limited partnership brought suit to prevent a federal tax lien⁴ from attaching to four parcels of real property it received from the partnership’s former general partners, Paul and Winnifred Christensen. The Internal Revenue Service⁵ made an assessment against the Christensens for unpaid income taxes and interest of more than \$560,000.⁶ The U.S. District Court for the District of Utah properly held that the United States did not have a valid lien against the real property.⁷

In *United States v. Craft*, the U.S. Supreme Court held that Don Craft had sufficient individual rights in property held as tenants by the

1 *United States v. Craft*, 122 S. Ct. 1414 (2002).

2 *Matthew* 19:6 (New International Version).

3 *Blue Canyon Ltd. v. United States*, No. 90-C-850W, 1992 U.S. Dist. LEXIS 2270 (D. Utah Feb. 6, 1992).

4 The section providing for federal tax liens under the Internal Revenue Code is 26 U.S.C. § 6321 (2002). Section 6321 provides:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

I.R.C. § 6321 (2000).

5 The Internal Revenue Service is “[t]he branch of the U.S. Treasury Department responsible for administering the Internal Revenue Code and providing taxpayer education.” BLACK’S LAW DICTIONARY 821 (7th ed. 1999).

6 *Blue Canyon*, 1992 U.S. Dist. LEXIS 2270 at *13.

7 *Id.* at *16. The United States argued that the partnership held the property as nominee for the Christensens and that the property had been fraudulently conveyed to the partnership. *Id.* at *1. The court recognized that the Christensens had substantial control over the partnership and received substantial benefits from the partnership assets. *Id.* at *14.

entirety⁸ to allow a federal tax lien to reach it.⁹ A court extending the holding of *Craft*, however, might find that the Christensens, as general partners, had sufficient rights to the property to allow a federal tax lien to reach it.¹⁰ The effect of such a ruling would be to prevent blameless partners from conveying the property or from retaining all of the proceeds from disposition.¹¹

Part II of this Note discusses tenancy by the entirety, the history of the federal tax lien statute, and how federal courts have interpreted the federal tax lien statute.¹² Part III discusses the events leading up to the *Craft* lawsuit, considers the *Craft* lawsuit itself, and examines the subsequent court decisions.¹³ Finally, Part IV analyzes whether entrepreneurs carrying on as unincorporated businesses and closely held corporations have sufficiently similar rights to tenants by the entirety to allow the *Craft* holding to be applied in the business setting.¹⁴

II. BACKGROUND

A. Tenancy by the Entirety

Tenancy by the entirety is a method of owning real property in which a husband and wife are considered to hold property as a single entity with a right of survivorship for the surviving spouse.¹⁵ The entity

8 Tenancy by the entirety is defined as “[a] joint tenancy that arises between a husband and wife when a single instrument conveys realty to both of them but nothing is said in the deed or will about the character of their ownership.” BLACK’S LAW DICTIONARY 1477 (7th ed. 1999).

9 United States v. *Craft*, 122 S. Ct. 1414, 1425 (2002).

10 See *id.* at 1429 n.4 (Thomas, J., dissenting) (arguing that the logic of the Court’s opinion could be extended to allow federal tax liens resulting from the liability of an individual partner to reach partnership property). But see *id.* at 1424 (noting that a federal tax lien may attach to individual partner’s interest in the partnership).

11 *Id.* at 639. In *Craft*, a sale of the property held to be subject to the tax lien was prevented. *Id.* The Internal Revenue Service was “undoubtedly entitled to any proceeds that Mr. Craft received or to which he was entitled from the 1989 conveyance of the tenancy by the entirety property. . . .” *Id.* at 1426 n.1 (Thomas, J., dissenting).

12 See *infra* notes 15 through 52 and accompanying text.

13 See *infra* notes 53 through 111 and accompanying text.

14 See, e.g., *Craft*, 122 S. Ct. at 1429 n.4 (Thomas, J., dissenting) (illustrating the potential far-reaching implications of the decision under partnership law).

15 JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 323 (4th ed. 1998). Tenancy by the entirety is like joint tenancy in that each requires unity of time, title, interest and possession, but differs in several ways including the requirement that the joint owners must be husband and wife. *Id.* at 322-23. Spouses may terminate a joint tenancy by unilaterally conveying a share of the property to a third party; spouses cannot unilaterally convey any interest in property held as tenants by the entirety. *Id.* at 323. Spouses may seek judicial partition of a joint tenancy; neither spouse may seek judicial partition of property held as tenants by the entirety. *Id.*

is a legal fiction similar to partnerships, corporations and limited liability companies.¹⁶ A spouse must obtain the other spouse's consent to alienate or encumber the property.¹⁷ The tenancy originated in English common law no later than the fifteenth century.¹⁸

The American colonies and early states generally adopted tenancy by the entirety from the English common law.¹⁹ The rise of the women's rights movement in the nineteenth century caused many states to abolish tenancy by the entirety and deterred other states from ever adopting the tenancy.²⁰ Currently, spouses may own property as tenants by the entirety in twenty-four states, the Virgin Islands and the District of Columbia.²¹

B. History and Scope of the Federal Tax Lien Statute

Congress first authorized the government to place liens on the assets of delinquent taxpayers in 1865.²² Congress enacted the current federal tax lien statute, 26 U.S.C. § 6321, in 1954. The statute creates

¹⁶ *Craft*, 122 S. Ct. at 1432.

¹⁷ Steve R. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 MO. L. REV. 839, 842 (1995).

¹⁸ Brief for Respondent at 2, *United States v. Craft*, 122 S. Ct. 1414 (2002) (No. 00-1831). For a detailed discussion of the history of tenancy by the entirety including its origins in English common law see John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35 (1997).

¹⁹ Brief for Respondent at 3, *United States v. Craft*, 122 S. Ct. 1414 (2002) (No. 00-1831).

²⁰ Johnson, *supra* note 17, at 843. Professor Dukeminier discussed the Married Women's Property Acts, which were enacted to protect wives' property and to provide legal autonomy: Beginning with Mississippi in 1839, all common law property states had, by the end of the nineteenth century, enacted Married Women's Property Acts. These statutes removed the disabilities of coverture and gave a married woman, like a single woman, control over all her property. Such property was her separate property, immune from her husband's debts.

DUKEMINIER, *supra* note 15, at 363.

²¹ Brief for the United States at 26; *United States v. Craft*, 122 S. Ct. 1414 (2002) (No. 00-1831). The states that currently recognize tenancy by the entirety are Alaska, Arkansas, Delaware, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Mississippi, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and Wyoming. *Id.* at 26 n.15. Ohio allowed tenancies by the entirety to be created from 1972 to 1985. *Id.* Hawaii allows non-married persons (parent and child, for example) to create a tenancy by the entirety upon registering as reciprocal beneficiaries. DUKEMINIER, *supra* note 15, at 323 n.3.

²² 13 Stat. 469 (1865). The statute provided that "if any person, bank association, company, or corporation, liable to pay any duty, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid." 13 Stat. 469, 470-71 (1865). Subsequent revisions of the federal tax lien statute were 14 Stat. 98 (1866), 20 Stat. 327 (1879), 37 Stat. 1016 (1913), 43 Stat. 994 (1925), 45 Stat. 791 (1928), and 53 Stat. 444 (1939).

liens in favor of the United States upon any property and rights to property of persons who neglect or refuse to pay delinquent federal taxes upon demand.²³ In 1954, Congress considered, but did not enact, an amendment to the federal tax lien statute that would have specifically included entireties property among the types of property to which a lien could attach.²⁴

*United States v. Bess*²⁵ was the first of three U.S. Supreme Court decisions that generally defined the scope of the federal tax lien statute. In *Bess*, the U.S. Supreme Court announced that the federal tax lien statute does not create property rights, but merely attaches to property rights that exist under state law.²⁶ In *Aquilino v. United States*,²⁷ the U.S. Supreme Court recognized that state law controls in determining the legal interest in property that might be subject to a tax lien.²⁸ The U.S. Supreme Court noted in *United States v. National Bank of Commerce* that "Congress meant to reach every interest in property that a taxpayer might have."²⁹

23 I.R.C. § 6321 (2000).

24 See H. R. REP. NO. 83-1337, at A406 (1954) (noting that proponents of the proposed amendment to the federal tax lien statute intended the amendment to include interests held as tenants by the entirety); S. REP. NO. 83-1622, at 575 (1954) (indicating that the proposed amendment would have provided that a federal tax lien could attach to property held as a tenant by the entirety). Opponents of extending the reach of the federal tax lien statute argue that the amendment was proposed because the Internal Revenue Service had been unsuccessful in convincing federal courts to stretch the scope of the statute. See, e.g., Brief for Respondent at 11, *United States v. Craft*, 122 S. Ct. 1414 (2002) (No. 00-1831). They view the defeat of the proposed amendment as evidence that Congress did not intend to interfere with the statute's interpretation by the federal courts. *Id.* But see *Craft*, 122 S. Ct. at 1425 (arguing that failed legislative proposals are not a good way to measure legislative intent and that the proposed amendment may have been defeated because members of Congress believed that property held as tenants by the entirety was already within the scope of the federal tax statute as enacted).

25 *United States v. Bess*, 357 U.S. 51 (1958).

26 *Id.* at 55. The Internal Revenue Service sought to recover the payment of unpaid taxes due by Molly Bess's husband from the proceeds she received from life insurance policies upon his death. *Id.* at 52-53. The U.S. Supreme Court limited the attachment of the lien to only the cash surrender value of the policies at the time of the insured's death because the insured did not have a property right in the death benefit. *Id.* at 55-56.

27 *Aquilino v. United States*, 363 U.S. 509 (1960).

28 *Id.* at 513. The petitioners and the Internal Revenue Service were competing for funds held by a county clerk on behalf of a restaurant owner. *Id.* at 510. The petitioners' claim resulted from a mechanic's lien; the federal tax lien resulted from unpaid social security and federal withholding taxes. *Id.* The U.S. Supreme Court remanded the case to the New York Court of Appeals to determine whether, under state law, the restaurant owner had property rights in the deposited funds. *Id.* at 515-16.

29 *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 720 (1985).

C. Federal Tenancy-by-the-Entirety Cases

In his dissenting opinion in *United States v. Craft*, Justice Thomas noted that “[f]or more than 50 years, every federal court reviewing tenancies by the entirety in States with a similar understanding of tenancy by the entirety as Michigan has concluded that a federal tax lien cannot attach to such property to satisfy an individual spouse’s tax liability.”³⁰ In *Shaw v. United States*,³¹ for example, the U.S. District Court for the Western District of Michigan considered whether a federal tax lien against one spouse could attach to property held as tenants by the entirety under Michigan law. The *Shaw* court acknowledged that it was bound by state property law and upheld the “peculiar nature of the estate as interpreted by the Michigan Supreme Court.”³²

More recently, the U.S. Court of Appeals for the Fourth Circuit considered *Pitts v. United States*.³³ In *Pitts*, the Internal Revenue Service attempted to attach a federal tax lien against only George Pitts to notes that George and Ellen Pitts received in exchange for property owned as tenants by the entirety.³⁴ The *Pitts* court indicated that the lien could not attach to the notes if the notes were entireties property under state law.³⁵

The U.S. Court of Appeals for the Third Circuit considered a

30 *United States v. Craft*, 122 S. Ct. at 1431 (Thomas, J., dissenting). See, e.g., *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971) (holding that the federal government had no valid claim against real property held as tenants by the entirety); *Benson v. United States*, 442 F.2d 1221 (D.C. Cir. 1971) (recognizing that entireties property cannot be subjected to a tax lien for the debt of one tenant); *United States v. Am. Nat’l Bank of Jacksonville*, 255 F.2d 504 (5th Cir. 1958) (concluding that a federal tax lien may not attach to entireties property to satisfy the tax obligations of one spouse); *Raffaele v. Granger*, 196 F.2d 620 (3d Cir. 1952) (holding that the property of an innocent spouse may not be taken to satisfy the unpaid tax debt of a delinquent spouse); *United States v. Hutcherson*, 188 F.2d 326 (8th Cir. 1951) (holding that a federal tax lien resulting from a husband’s unpaid taxes did not attach to entireties property); *United States v. Nathanson*, 60 F. Supp. 193 (E.D. Mich. 1945) (noting that the Federal Revenue Act provided no means to use entireties property to collect taxes due from one person alone).

31 *Shaw v. United States*, 94 F. Supp. 245 (W.D. Mich. 1939).

32 *Id.* at 245. For a discussion of the “peculiar nature,” see *supra* notes 15 through 21 and accompanying text.

33 *Pitts v. United States*, 946 F.2d 1569 (4th Cir. 1991), certifying questions to 408 S.E.2d 901 (Va. 1991).

34 *Id.* at 1570.

35 *Id.* at 1571-72. The Virginia Supreme Court has ruled that proceeds from the sale of entireties property are generally also held as entireties property. *Oliver v. Givens*, 129 S.E.2d 661, 663 (Va. 1963). The Internal Revenue Service argued that the *Oliver* holding should be interpreted to apply only to cash proceeds. *Pitts*, 946 F.2d at 1570. Ellen Pitts argued that *Oliver* should be interpreted broadly enough to apply to the notes. *Id.* at 1570. Because state law determined whether the notes were held as tenants by the entirety, and this determination would be dispositive in the case, the *Pitts* court certified the question to the Supreme Court of Virginia. *Id.* at 1571-72.

similar issue in *Internal Revenue Service v. Gaster*.³⁶ In *Gaster*, the Internal Revenue Service attempted to collect proceeds from a bank account jointly owned by the Gasters.³⁷ The *Gaster* court acknowledged that the federal tax lien could not reach the account if the Gasters owned the account as tenants by the entirety.³⁸

D. U.S. Supreme Court State-Law Legal Fiction Cases

While the lower federal courts were consistently holding that federal tax liens could not attach to property held as tenants by the entirety, the U.S. Supreme Court decided a line of cases in which it found property or rights to property where state-law legal fictions determined that none existed.³⁹ In 1971, the U.S. Supreme Court decided *United States v. Mitchell*.⁴⁰ In *Mitchell*, a wife in Louisiana, a community property⁴¹ state, made a statutory election that exonerated her from community debts incurred during her marriage.⁴² The Court held that the renouncing spouse remained liable for federal income tax on the community income despite the fact that she was not liable to creditors under state law.⁴³

36 *Internal Revenue Serv. v. Gaster*, 42 F.3d 787 (3d Cir. 1994).

37 *Id.* at 789.

38 *Id.* at 791. The Court noted that even if the lien was otherwise properly attached:

[U]nder Delaware law, the IRS would not be entitled to the money in the account if the Gasters owned the account as tenants by the entireties since both Donald and Mary Ann Gaster would be "seized, not merely of equal interests, but of the whole estate during their lives and the interest of neither of them can be sold, attached or liened except by the joint act of both husband and wife."

Id. (quoting *Steigler v. Ins. Co. of N. Am.*, 384 A.2d 398, 400 (Del. 1978)). The case was ultimately decided on other grounds. *Id.* at 795.

39 See, e.g., *Drye v. United States*, 528 U.S. 49 (1999) (holding that federal law determines whether state-delineated rights qualify as property or rights to property under the federal tax lien statute); *United States v. Irvine*, 511 U.S. 224 (1994) (holding that the disclaimer of a remainder interest in a trust is subject to federal gift taxation); *United States v. Mitchell*, 403 U.S. 190 (1971) (holding that a spouse is personally liable for federal income tax on community income despite statutorily electing to renounce community gains).

40 *United States v. Mitchell*, 403 U.S. 190 (1971).

41 See BLACK'S LAW DICTIONARY 274 (7th ed. 1999). Community property is defined as "[p]roperty owned in common by husband and wife as a result of its having been acquired during the marriage by means other than an inheritance or gift to one spouse, each spouse holding a one-half interest in the property." *Id.* The eight states with community property systems are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. DUKEMINIER, *supra* note 15, at 397.

42 *Mitchell*, 403 U.S. at 191. LA. CIV. CODE ANN. art. 2410 (repealed 1980) provided that "[b]oth the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains."

43 *Mitchell*, 403 U.S. at 205. The Court considered the arguments opposing attachment and

The U.S. Supreme Court decided *United States v. Irvine*⁴⁴ in 1994. In *Irvine*, Sally Ordway Irvine disclaimed her five-sixteenths interest in the principal of a trust established by her grandfather.⁴⁵ The issue in the case was whether Ms. Irvine was liable for federal gift tax as a result of the disclaimer.⁴⁶ The Court held that the disclaimer created federal gift tax liability for Ms. Irvine despite the state-law fiction that she never received the property.⁴⁷

Five years later, the U.S. Supreme Court was faced with another disclaimer issue in *Drye v. United States*.⁴⁸ In *Drye*, the Internal Revenue Service had attached tax liens against all of Rohn Drye's property at the time of his mother's death.⁴⁹ Mr. Drye was the sole heir to his mother's estate but disclaimed the inheritance.⁵⁰ The Court faced the issue of whether the disclaimer prevented the federal tax lien from attaching to the inheritance.⁵¹ Relying in part on *Mitchell* and *Irvine*, the Court concluded that the lien had attached to the inheritance, holding that federal law determines whether state-delineated rights qualify as

concluded:

[T]his right of the wife to renounce or repudiate must not be misconstrued as an indication that she had never owned and possessed her share [A]n exempt status under state law does not bind the federal collector. Federal law governs what is exempt from federal levy. . . . [T]here is no room . . . for automatic exemption of property that happens to be exempt from state levy under state law.

Id. at 204-05.

44 *United States v. Irvine*, 511 U.S. 224 (1994).

45 *Id.* at 227. The disclaimer was made under Minn. Stat. § 501.211 (repealed 1989), "which permitted the disclaimer of a future interest at any time within six months of the event finally identifying the disclaimant and causing her interest to become indefeasibly fixed." *Irvine*, 511 U.S. at 227.

46 *Id.* at 226. After an audit of her federal gift tax return, Irvine amended the return to include additional tax of \$7,468,671, and interest exceeding \$2 million. *Id.* at 227-28.

47 *Id.* at 242. After considering the legislative intent behind enactment of the federal gift tax, the Court concluded that "Congress had not meant to incorporate state-law fictions as touchstones of taxability when it enacted the Act. Absent such a legal fiction, the federal gift tax is not struck blind by a disclaimer." *Id.* at 240.

48 *Drye v. United States*, 528 U.S. 49 (1999).

49 *Id.* at 53. The Court indicated that "Drye was insolvent and owed the Government approximately \$325,000, representing assessments for deficiencies in years 1988, 1989, and 1990." *Id.*

50 *Id.* Irma Drye's estate was worth approximately \$233,000. *Id.* at 52-53. The disclaimer created a state-law fiction that Drye had predeceased his mother. *Id.* at 53. As a result of the disclaimer, Drye's daughter, Theresa Drye, received the estate with which she created the Drye Family 1995 Trust. *Id.*

51 *Drye*, 528 U.S. at 54-55. Some lower federal courts had adopted a state-theory test to determine whether a federal tax lien would attach to a disclaimed inheritance. *Id.* at 55 n.1. Under this test, if a state held an acceptance-rejection theory of disclaimer, then federal tax liens would not attach; if a state held a transfer theory of disclaimer, then federal tax liens would attach. *Id.*

property or rights to property under the federal tax lien statute.⁵²

III. STATEMENT OF THE CASE

A. Statement of the Facts

Don and Sandra Craft were married in 1956.⁵³ On May 26, 1972, the Crafts purchased a parcel of real property as tenants by the entirety.⁵⁴ Don Craft failed to file federal income tax returns for the years from 1979 through 1986.⁵⁵ The Internal Revenue Service assessed a tax deficiency against Don Craft for \$482,446.73 in 1988.⁵⁶ On March 30, 1989, the Internal Revenue Service filed a notice of federal tax lien

52 *Id.* at 61. The Court concluded its opinion by noting:

In sum, in determining whether a federal taxpayer's state-law rights constitute property or rights to property, the important consideration is the breadth of the control the taxpayer could exercise over the property. Drye had the unqualified right to receive the entire value of his mother's estate (less administrative expenses), or to channel that value to his daughter. The control rein he held under state law, we hold, rendered the inheritance property or rights to property belonging to him within the meaning of § 6321, and hence subject to the federal tax liens that sparked this controversy.

Id. (internal citations and quotations omitted).

53 Brief for Respondent at 7, *United States v. Craft*, 122 S. Ct. 1414 (2002) (No. 00-1831).

54 *Craft v. United States*, 65 F. Supp. 2d 651, 653 (W.D. Mich. 1999), *aff'd* by 233 F.3d 358 (6th Cir. 2000), *rev'd* by 122 S. Ct. 1414 (2002). The Crafts purchased the property, located at 2656 Berwyck Road in Grand Rapids, Michigan, for \$48,000, and encumbered it with a \$37,000 mortgage. *Craft v. United States*, 140 F.3d 638, 639 (6th Cir. 1998). The house at that location was the sole residence of the Crafts. Brief for Respondent at 7, *United States v. Craft*, 122 S. Ct. 1414 (2002) (No. 00-1831). Sandra Craft alleged that Don abandoned the home in July 1986. *Craft v. United States*, No. 1:93-CV-306, 1995 WL 549317, at *1 (W.D. Mich. July 11, 1995).

55 *United States v. Craft*, 122 S. Ct. at 1419. Don Craft practiced law during this period, earning substantial income. Brief for the United States at 2, *United States v. Craft*, 122 S. Ct. 1414 (2002) (No. 00-1831). For an argument that the federal income tax system is unconstitutional see David Franke, *Is Income Tax Legal?: Evidence Suggests 16th Amendment Never Ratified*, WORLDNETDAILY.COM, July 9, 1999, at http://www.givemeliberty.org/features/taxes/19990709_xcdfr_is_income.htm (suggesting that the Sixteenth Amendment, the constitutional basis for federal income taxation, was fraudulently ratified).

56 *Craft v. United States*, 140 F.3d at 639. The assessment was based upon substitute income tax returns prepared by the Internal Revenue Service pursuant to 26 U.S.C. § 6020(b). *Id.* That section of the Internal Revenue Code provides:

(1) Authority of Secretary to execute return.—If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise. (2) Status of returns.—Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

I.R.C. § 6020(b) (2000).

against all of Don Craft's property and rights to property.⁵⁷ Sandra Craft's individual tax liabilities were not in issue.⁵⁸

On August 28, 1989, the Crafts conveyed their real property to Sandra Craft by quitclaim deed for one dollar.⁵⁹ A title search uncovered the tax lien when Sandra Craft subsequently attempted to sell the property.⁶⁰ The Internal Revenue Service eventually agreed to release the lien, upon the condition that half of the proceeds be held in escrow, thereby allowing Sandra Craft to sell the property.⁶¹

B. Procedural History

Sandra Craft filed a complaint in the U.S. District Court for the Western District of Michigan on April 23, 1993, seeking to quiet title⁶²

57 *Craft v. United States*, 140 F.3d at 639. The notice was filed with the Register of Deeds in Kent County, Michigan. *Id.* As far as the IRS is concerned, assessment is an internal procedure about which no notice need be given to the taxpayer. This secret lien is valid against the taxpayer and everyone else except "any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor." In order to make its tax lien effective against these excepted classes, the IRS must file a notice of the lien.

ROBERT L. JORDAN ET AL., *COMMERCIAL LAW* 245 (5th ed. 2000) (quoting 26 U.S.C. § 6323(a)).

58 Kent L. Jones, Esq., arguing on behalf of the United States, indicated that "I don't know whether she had any income of her own. I don't know whether she was required to, whether she did file a return—this case does not involve this—the wife's taxes. It involves the half-million dollars of taxes of the husband." United States Supreme Court Official Transcript at *7, *United States v. Craft* (2001) (No. 00-1831).

59 *Craft v. United States*, 140 F.3d at 639. Don Craft filed a petition under Chapter 7 of the Bankruptcy Code on January 30, 1992. *Id.* at 639-40. Chapter 7 is "[t]he chapter of the Bankruptcy Code allowing a trustee to collect and liquidate a debtor's property, either voluntarily or by court order, to satisfy creditors." *BLACK'S LAW DICTIONARY* 226 (7th ed. 1999).

60 *United States v. Craft*, 122 S. Ct. at 1419. The discovery of the tax lien prevented the sale of the property. *Craft v. United States*, 140 F.3d at 640. Sandra Craft asked the Internal Revenue Service to release the lien, but her request was denied. *Id.*

61 *United States v. Craft*, 122 S. Ct. at 1419. Sandra Craft sold the property for \$119,888.20 in June 1992 to a third party. *Craft v. United States*, 233 F.3d 358, 362 (6th Cir. 2000), *rev'd by* 122 S. Ct. 1414 (2002). Sandra Craft received \$59,944.10 from the proceeds and the same amount was placed in a non-interest bearing escrow account. *Id.* By agreement, the funds held in escrow remained subject to the federal tax lien to the same extent that the real property had been subject to the lien. *Id.* The bankruptcy court entered an order of discharge in Don Craft's Chapter 7 case on June 1, 1992. *Craft v. United States*, 140 F.3d at 640. The bankruptcy court closed the Chapter 7 case on June 11, 1992. *Id.* Don Craft moved to re-open the bankruptcy case on August 14, 1992, seeking a determination of whether the federal tax lien attached to the property. *Id.* The bankruptcy court re-opened the case, but closed it a second time for lack of jurisdiction because the property at issue was not part of the bankruptcy estate. *Id.*

62 An action to quiet title is "[a] proceeding to establish a plaintiff's title to land by compelling the adverse claimant to establish a claim or be forever estopped from asserting it." *BLACK'S LAW DICTIONARY* 30 (7th ed. 1999).

to the proceeds held in escrow.⁶³ The court granted summary judgment for the United States, holding that “[a]t the time the joint conveyance was made, the entireties estate terminated. At that point, each spouse took an equal half interest in the estate and the government’s lien attached to Mr. Craft’s interest.”⁶⁴

Sandra Craft appealed the District Court’s grant of summary judgment against her.⁶⁵ The United States filed a cross-appeal on both of the lower court’s decisions of when the lien attached and the value of Don Craft’s interest in the property.⁶⁶ The U.S. Court of Appeals for the Sixth Circuit was not persuaded by decisions in which the U.S. Supreme Court did not allow state-law legal fictions to prevent attachment.⁶⁷

63 *Craft v. United States*, 140 F.3d at 640. The complaint was authorized by 28 U.S.C. § 2410(a). *Id.* That section provides that:

[T]he United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—(1) to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien.

28 U.S.C. § 2410(a) (2000).

64 *Craft v. United States*, No. 1:93-CV-306, 1994 WL 669680, at *3 (W.D. Mich. Sept. 12, 1994), *rev’d* by 140 F.3d 638 (6th Cir. 1998). Sandra Craft argued that the Court should follow *Cole v. Cardoza*. *Id.* at *2. In *Cole*, the U.S. Court of Appeals for the Sixth Circuit held that “the federal tax lien does not attach to the subject property owned by Eugene and Mary Cole by the entirety, because the Government’s tax lien is against Eugene Cole only.” *Cole v. Cardoza*, 441 F.3d 1337, 1343 (6th Cir. 1971). The Internal Revenue Service argued that each spouse owned a separate interest to which a federal tax lien could attach. *Craft v. United States*, No. 1:93-CV-306, 1994 WL 669680, at *2. The Court relied on *United States v. Certain Real Property Located at 2525 Leroy Lane, West Bloomfield, Michigan* and *Fischre v. United States*. *Id.* at 3. In *Leroy Lane*, the U.S. Court of Appeals for the Sixth Circuit held that “the government was precluded from obtaining the husband’s interest in the property unless . . . the entireties estate was otherwise terminated by divorce of joint conveyance in accordance with Michigan law.” *United States v. Certain Real Prop. Located at 2525 Leroy Lane*, 972 F.2d 136, 137 (1992). *Fischre* was a U.S. District Court case in which the Western District Court of Michigan concluded that each spouse’s interest “remains inchoate until the entireties estate is terminated by the death of one spouse, divorce, or joint conveyance.” *Fischre v. United States*, 852 F.Supp 628, 630 (W.D. Mich. 1994). The *Craft* court granted Sandra Craft’s motions to amend the judgment and to stay execution because an issue of fact remained as to Don Craft’s interest in the property. *Craft v. United States*, No. 1:93-CV-306, 1994 WL 669680, at **4-5. The court then denied a renewed motion for summary judgment by the United States based upon Sandra Craft’s failure to timely respond to Requests for Admission. *Craft v. United States*, No. 1:93-CV-306, 1995 WL 549317, at **1-2 (W.D. Mich. July 11, 1995). The court finally determined that Don Craft’s interest in the proceeds of the sale was \$50,293.94, which was half of the stipulated fair market value of the property less the outstanding mortgage balance. *Craft v. United States*, No. 1:93-CV-306, 1995 WL 795088, at *1 (W.D. Mich. Oct. 26, 1995).

65 *Craft*, 140 F.3d at 639.

66 *Id.*

67 *Id.* at 643. The court concluded that the discussed cases “stand for the proposition that once a property interest exists under state law, state law cannot interfere with attachment of a lien to that property interest—a matter that is governed by federal law.” *Id.* For a further discussion of this line of cases, *see supra* notes 39 through 52 and accompanying text.

Holding that “Don never held an interest in the Berwyck Property to which the United States’ lien could attach,” the Sixth Circuit reversed the lower court’s grant of summary judgment in favor of the United States.⁶⁸ The Sixth Circuit also held that Don Craft did not have a future interest to which the federal tax lien could attach.⁶⁹ Finally, the Sixth Circuit remanded the case because the lower court failed to consider whether the transfer to Sandra Craft was a fraudulent conveyance.⁷⁰

On remand, the district court determined that the conveyance of the property by quitclaim deed was not a fraudulent conveyance.⁷¹ However, prior to the second trial at the district court, the United States argued for the first time that the mortgage payments Don Craft had made while he was insolvent constituted a fraudulent conveyance.⁷² The court agreed and awarded \$6,693 to the United States.⁷³

68 *Craft*, 140 F.3d at 644-45. Criticizing the lower court’s decision that the lien attached during the conveyance, the court noted:

We are unaware of any precedent indicating that an entireties estate is automatically transformed into a tenancy in common as an intermediary step in the conveyance of the property. To the contrary, it is clear that at the time the entireties estate terminated, Sandra was vested with “full and complete title.”

Id. at 644 (internal citations omitted).

69 *Id.*

70 *Id.* A fraudulent conveyance is defined as “[a] transfer of property for little or no consideration, made for the purpose of hindering or delaying a creditor by putting the property beyond the creditor’s reach. . . .” BLACK’S LAW DICTIONARY 672 (7th ed. 1999).

71 *Craft v. United States*, 65 F. Supp. 2d 651, 662 (W.D. Mich. 1999), *aff’d* by 233 F.3d 358 (6th Cir. 2000), *rev’d* by 122 S. Ct. 1414 (2002). The United States had the burden to prove a fraudulent conveyance. *Id.* at 656. Under Michigan law, “[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.” MICH. COMP. LAWS § 566.14 (repealed 1998). Alternatively, “[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.” MICH. COMP. LAWS § 566.17 (repealed 1998). The court considered numerous cases on point and concluded that “[b]ecause Don’s creditors . . . could not attach Don’s interest in the Berwyck property to satisfy Don’s individual debts, Don’s conveyance of his interest to Sandra could not have constituted a fraud upon his creditors because the property was beyond their reach.” *Craft*, 65 F. Supp. 2d at 657 (citation omitted).

72 *Id.* at 654. Sandra Craft argued that fraudulent conveyance must be pleaded as a counterclaim and that the statute of limitations prevented the United States from making a counterclaim. *Id.* The court, relying on 26 U.S.C. § 6502 and FED. R. CIV. P. 8(c), allowed the pleading. *Id.* at 654-55. 26 U.S.C. § 6502 provides in part:

Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—(1) within 10 years after the assessment of the tax.

I.R.C. § 6502 (2000). FED. R. CIV. P. 8(c) provides that “[w]hen a party has mistakenly designated a defense as a counterclaim, or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.”

The United States appealed the second district court decision arguing that the Sixth Circuit Court of Appeals had misapplied the law in its earlier decision.⁷⁴ Sandra Craft argued that this appeal was precluded by the “law of the case”⁷⁵ doctrine.⁷⁶ An exception to the doctrine allows an appeal if the prior decision is “clearly erroneous and would work a manifest injustice.”⁷⁷ The court held that the prior decision was not clearly erroneous because the decision had support in precedent within the circuit and the U.S. Supreme Court had not expressly overruled the precedent.⁷⁸

On cross-appeal, Sandra Craft first argued that the lower court should not have heard the fraudulent enhancement argument.⁷⁹ She claimed that the lower court was limited to the issue of whether the transfer by quitclaim deed was a fraudulent conveyance.⁸⁰ The Sixth Circuit concluded that the lower court had not exceeded the scope of remand.⁸¹

73 *Craft*, 65 F. Supp. 2d at 662. The United States argued that this amount should include the total mortgage payments made by Don and Sandra Craft while Don was insolvent and the increase in the value of the property resulting from market forces during the same time period. *Id.* at 661. The court found no basis to award funds based solely on the increase in value resulting from market forces because the increase would have occurred regardless of whether Don Craft made the mortgage payments. *Id.* at 661 n.8. The mortgage payments during the period in question totaled \$19,692. *Id.* at 662. The court deducted the amount of the payments that was attributable to interest because “such payments do not increase a debtor’s equity or constitute a fraud on creditors.” *Id.*

74 *Craft v. United States*, 233 F.3d 358, 361 (6th Cir. 2000), *rev’d by* 122 S. Ct. 1414 (2002).

75 See BLACK’S LAW DICTIONARY 893 (7th ed. 1999). “Law of the case” is “[t]he doctrine holding that a decision rendered in a former appeal of a case is binding in a later appeal.” *Id.*

76 *Craft*, 233 F.3d at 361. The U.S. Supreme Court has acknowledged the doctrine. *Arizona v. California*, 460 U.S. 605, 618 (1983). See also John G. Stafford, Jr., *Understanding the “Res Judicata” and “Law of the Case” Doctrines*, BRIEFING PAPERS, Sept. 2002 at 1 (2002) (providing guidelines to assist in understanding the effect of the doctrine); John R. Knight, *The Law of the Case Doctrine: What Does it Really Mean?*, FED. LAW., Oct. 1996 at 8 (1996) (noting the inconsistent application of the doctrine by federal appellate courts).

77 *Craft*, 233 F.3d at 364.

78 *Id.* The court relied on *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971) as precedent. The court acknowledged that reasonable arguments could be made for and against allowing a federal tax lien to reach property held as tenants by the entirety. *Craft*, 233 F.3d at 3645. In *Cole*, the Sixth Circuit Court of Appeals reasoned:

In Michigan tenants by the entirety hold under a single title. Neither spouse has the power without concurrence of the other to alienate the estate or any interest therein, and neither the land nor the rents and profits therefrom are subject to levy or execution for the sole debts of the husband Thus, in the present situation, the federal tax lien does not attach to the subject property owned by Eugene and Mary Cole by the entirety, because the Government’s tax lien is against Eugene Cole only.

Cole v. Cardoza, 441 F.2d 1337, 1343 (6th Cir. 1971).

79 *Craft*, 233 F.3d at 369.

80 *Id.* at 370.

81 *Id.* In its earlier opinion, the Sixth Circuit indicated that “upon remand, the district court

Second, Sandra Craft claimed that the fraudulent enhancement argument was barred by the statute of limitations.⁸² The Sixth Circuit rejected this argument by holding that the lower court had properly applied the ten-year statute of limitations under 26 U.S.C. § 6502.⁸³

Third, Sandra Craft argued that the United States had no remedy because Don Craft had passed away.⁸⁴ She claimed that the Internal Revenue Service could not reach the escrow funds because they reverted to her upon Don's death.⁸⁵ The Sixth Circuit rejected this argument because the lower court's award was based upon Don's attempt to hide personal funds to which the tax lien could attach rather than upon his individual interest in the property.⁸⁶

Finally, Sandra Craft argued that the Internal Revenue Service owed her interest on the portion of the escrow funds that was not awarded to the United States by the lower court.⁸⁷ She claimed that 28 U.S.C. § 2411 applied because she was entitled to recover the funds

should consider whether the Berwyck Property was transferred for fraudulent purposes." *Craft v. United States*, 140 F.3d 638, 644 (6th Cir. 1998). This language did "not raise exclusively the question of whether the August 1989 transfer itself was fraudulent; rather, it permitted the district court to consider also whether Don and Sandra transferred the property for other fraudulent purposes as well." *Craft*, 233 F.3d at 370.

82 *Id.* at 369.

83 *Id.* at 372-73. Section 6502 provides:

Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun . . . within 10 years after the assessment of the tax.

I.R.C. § 6502 (2000).

84 *Craft*, 233 F.3d at 369. Don Craft died in August 1998. *Id.* at 373.

85 *Id.* And to further her argument,

She claims that the government stipulated at an early point in the case that its lien attached to proceeds of the sale of the Berwyck Property to the same extent that the lien attached to the property itself; once this court found that the tax lien did not attach to the property, *see Craft I*, 140 F.3d at 643-44, the lien attached to nothing and the IRS had nothing to enforce.

Id. at 373 (footnote omitted).

86 *Id.*

87 *Id.* at 369. Federal law provides:

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.

28 U.S.C. § 2411 (2000).

pursuant to a court judgment.⁸⁸ The United States argued that statute did not apply because the escrow funds were not an overpayment and because the judgment did not occur in a tax-refund case.⁸⁹ The Sixth Circuit determined that Sandra Craft failed to meet the burden of proof required to prevail on this argument.⁹⁰

The United States petitioned for a writ of certiorari, which the U.S. Supreme Court granted on September 25, 2001.⁹¹ The Court granted certiorari “to consider the Government’s claim that respondent’s husband had a separate interest in the entireties property to which the federal tax lien attached.”⁹² The United States did not seek review of the district court’s determination that the transfer by quitclaim deed was not a fraudulent conveyance.⁹³

C. The Majority Opinion

In the U.S. Supreme Court, a six-to-three majority held that Don Craft’s individual interest in the property held as tenants by the entirety was property or rights to property under the federal tax lien statute.⁹⁴ Writing for the majority, Justice O’Connor began the analysis by

⁸⁸ *Craft*, 233 F.3d at 374.

⁸⁹ *Id.* The Sixth Circuit questioned the strength of this argument:

In *Shaw*, the Supreme Court simply cited § 2411 as one of several examples of Congress expressly waiving the government’s immunity with respect to interest awards, describing § 2411 in a parenthetical as “expressly authorizing prejudgment and postjudgment interest payable by the United States in tax-refund cases.” This parenthetical description of a statute, contained in a footnote within dicta, is not dispositive of the meaning of § 2411.

Id. at 374 (citations omitted) (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 318 n.6 (1986)).

⁹⁰ *Id.* at 374-75. The Sixth Circuit implied that Sandra Craft could have prevailed, noting that “[t]he language of § 2411 is broad.” *Id.* at 374. However, Sandra Craft cited only one district court case in support of her argument, and that case arguably supported the United States’ argument. *Id.* at 375.

⁹¹ *United States v. Craft*, 533 U.S. 976 (2001).

⁹² *United States v. Craft*, 122 S. Ct. 1414, 1420 (2002).

⁹³ *Id.* at 1426.

We express no view as to the proper valuation of respondent’s husband’s interest in the entireties property, leaving this for the Sixth Circuit to determine on remand. We note, however, that insofar as the amount is dependent upon whether the 1989 conveyance was fraudulent . . . this case is somewhat anomalous. The Sixth Circuit affirmed the District Court’s judgment that this conveyance was not fraudulent, and the Government has not sought certiorari review of that determination. Since the District Court’s judgment was based on the notion that, because the federal tax lien could not attach to the property, transferring it could not constitute an attempt to evade the Government creditor, 65 F.Supp.2d at 657-659, in future cases, the fraudulent conveyance question will no doubt be answered differently.

Id.

⁹⁴ *Id.* at 1425.

examining the rights Don Craft had in the property under Michigan law.⁹⁵ The Court concluded that Don Craft had:

the right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with the respondent's consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the respondent's consent, and the right to block respondent from selling or encumbering the property unilaterally.⁹⁶

Then the Court considered the federal question of whether these state-law rights qualified as property under the federal tax lien statute.⁹⁷ The Court, apparently in reliance on the line of state-law legal fiction cases, indicated that "state law labels are irrelevant to the federal question of which bundle of rights constitute property that may be attached by a federal tax lien."⁹⁸ The majority reasoned that the combination of the right to receive income and the right to exclude others might be sufficient to qualify as property or rights to property under the statute.⁹⁹ The Court was not dissuaded by Don Craft's inability to unilaterally alienate the property.¹⁰⁰

Justice O'Connor expressed concern that a large amount of property would be exempted from federal tax liens.¹⁰¹ The Court noted that, if neither spouse was held to own individual interests in entireties property, the result would lead to abuse of the federal tax system by

95 *Id.* at 1421-22.

96 *Id.* at 1422. However, in *Long v. Earle*, the Supreme Court of Michigan noted that "[i]t is well settled under the law of this state that one tenant by the entirety has no interest separable from that of the other. . . ." *Long v. Earle*, 269 N.W. 577, 581 (Mich. 1936).

97 *Craft*, 122 S. Ct. at 1422. See also Steve R. Johnson, *After Drye: The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests*, 75 IND. L.J. 1163, 1166 (2000) (arguing that the federal question of whether an ability to use or dispose of property subjects the property to a federal tax lien should not be affected by state characterization of that ability). But see *Craft*, 122 S. Ct. at 1428 (Thomas, J. dissenting) (noting that such analysis is appropriate only when state laws alter property rights after the fact).

98 *Id.* at 1420. See *supra* notes 39 through 52 and accompanying text.

99 *Id.* at 1423.

100 The Court reasoned that "[t]here is no reason to believe, however, that this one stick . . . is essential to the category of property." *Id.*

101 *Id.* at 1423. Justice O'Connor also noted the "absurd" result that entireties property might not be available to the Internal Revenue Service to aid in its collection efforts. *Id.* at 1424. Presumably Justice O'Connor opposes land-ownership by the federal government for the same reason. See generally *The Endless Range War* (May 16, 2001), available at <http://www.free-market.net/spotlight/takings/> (noting that the federal government owns about one-third of the land in the United States).

allowing spouses to shield property from collection.¹⁰² Finally, the Court noted that the legislative history and the common-law background of the federal tax lien statute are ambiguous as to whether Congress intended the statute to reach entireties property.¹⁰³

D. The Dissenting Opinions

In a brief dissenting opinion, Justice Scalia regretted that the protection afforded by tenancy by entirety would be limited by the Court's decision.¹⁰⁴ He noted that stay-at-home mothers are much more likely to take such property by survivorship and are much less likely to have individual federal tax deficiencies.¹⁰⁵

In a separate dissenting opinion, Justice Thomas attacked the majority's reasoning in its conclusion that a taxpayer could subject property to federal tax liens merely by possessing a sufficient quantity of rights to the property.¹⁰⁶ Justice Thomas stated, "[t]his amorphous construct ignores the primacy of state law in defining property interests, eviscerates the statutory distinction between 'property' and 'rights to property' drawn by § 6321, and conflicts with an unbroken line of authority from this Court, the lower courts, and the IRS."¹⁰⁷ The majority misapplied the line of state-law legal fiction cases, Justice

¹⁰² *Id.* at 1424. *But see* *Libertarian Party 2000 National Campaign Platform* (2001), available at <http://www.lp.org/issues/campplat/> (indicating that the collection of federal income taxes would not be necessary if the federal government limited itself to its constitutional functions).

¹⁰³ *Craft*, 122 S. Ct. at 1425. *See also supra* note 24.

¹⁰⁴ *Id.* at 1426 (Scalia, J., dissenting). Justice Thomas joined in Justice Scalia's dissenting opinion. *Id.* at 1419. Justice Scalia also pointed to an inconsistency in the majority's reasoning.

I join Justice THOMAS's dissent, which points out (to no relevant response from the Court) that a State's decision to treat the marital partnership as a separate legal entity, whose property cannot be encumbered by the debts of its individual members, is no more novel and no more "artificial" than a State's decision to treat the commercial partnership as a separate legal entity, whose property cannot be encumbered by the debts of its individual members.

Id. at 1426. (Scalia, J., dissenting).

¹⁰⁵ *Id.* *See also* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21 (1994) (considering the implications of the fact that wives generally outlive their husbands). The recent increase in stay-at-home mothers is largely attributable to the popularity of homeschooling. *See, e.g.,* Anita Manning, *Life in '94 Will Offer Glimpse into Next Century*, USA TODAY, Dec. 22, 1993 at 1D (identifying homeschooling as one of the major trends of the 1990's).

¹⁰⁶ *Craft*, 122 S.Ct. at 1426-27 (Thomas, J., dissenting). Justices Stevens and Scalia joined in Justice Thomas' dissenting opinion. *Id.* at 1419.

¹⁰⁷ *Id.* at 1427 (Thomas, J., dissenting). *See* *Aquilino v. United States*, 363 U.S. 509 (1960) (recognizing that state law controls in determining the legal interest in property purportedly subject to a federal tax lien). *See also* *United States v. Bess*, 357 U.S. 51 (1958) (holding that federal tax liens attach only to property rights that exist under state law). For a discussion of the "unbroken line of authority," see *supra* notes 30 through 38 and accompanying text.

Thomas reasoned, because the cases concerned only whether state law could prevent a federal tax lien from attaching to property after a property interest was created.¹⁰⁸

Justice Thomas relied on the line of cases in which federal courts have concluded that entireties property was beyond the reach of federal tax liens to conclude that Don Craft did not have property under the tax lien statute.¹⁰⁹ Justice Thomas also argued that none of the rights to property upon which the majority relied were within the reach of the tax lien statute.¹¹⁰ Finally, Justice Thomas noted that the Internal Revenue Service has consistently recognized that liens against only one spouse cannot reach entireties property.¹¹¹

IV. ANALYSIS

In his dissenting opinion, Justice Thomas alluded to the possibility that the Court's holding could be extended to allow federal tax liens to reach property owned by business entities.¹¹² Justice Thomas noted that

108 *Craft*, 122 S. Ct. at 1428 (Thomas, J., dissenting). *But see* Johnson, *supra* note 97, at 1166 (arguing that the federal question of whether any ability to use or dispose of property subjects the property to a federal tax lien is strictly a federal question).

109 *Craft*, 122 S. Ct. at 1431-32 (Thomas, J., dissenting).

110 *Id.* at 1429-30 (Thomas, J., dissenting).

111 *Id.* at 1431-32 (Thomas, J., dissenting). In a footnote, Justice Thomas cited, *See, e.g.*, Internal Revenue Manual § 5.8.4.2.3 (RIA 2002), available at WESTLAW, RIA-IRM database (Mar. 29, 2002) (listing "property owned as tenants by the entirety" as among the assets beyond the reach of the Government's tax lien); *id.*, § 5.6.1.2.3 (recognizing that a *consensual* lien may be appropriate "when the federal tax lien does not attach to the property in question. For example, an assessment exists against only one spouse and the federal tax lien does not attach to real property held as tenants by the entirety"); IRS Chief Counsel Advisory (Aug. 17, 2001) (noting that consensual liens, or mortgages, are to be used "as a means of securing the Government's right to collect from property the assessment lien does not attach to, *such as real property held as a tenancy by the entirety*" (emphasis added)); IRS Litigation Bulletin No. 407 (Aug. 1994) ("Traditionally, the government has taken the view that a federal tax lien against a single debtor-spouse does not attach to property or rights to property held by both spouses as tenants by the entirety"); IRS Litigation Bulletin No. 388 (Jan. 1993) (explaining that neither the Department of Justice nor IRS chief counsel interpreted *United States v. Rodgers*, 461 U.S. 677, 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983), to mean that a federal tax lien against one spouse encumbers his or her interest in entireties property, and noting that it "do[es] not believe the Department will again argue the broader interpretation of *Rodgers*," which would extend the reach of the federal tax lien to property held by the entireties).

Id. at 1432 n.9 (Thomas, J., dissenting).

112 *Id.* at 1429 n.4 (Thomas, J., dissenting). Justice Thomas noted that, "[t]he Court's reasoning that because a taxpayer has rights to property a federal tax lien can attach not only to those rights but also to the property itself could have far-reaching consequences." *Id.* (Thomas, J., dissenting).

"I see no principled way to distinguish between the propriety of attaching the federal tax lien to partnership property to satisfy the tax liability of a partner . . . and the propriety of attaching the federal tax lien to tenancy by the entirety property. . . ." ¹¹³ Theoretically, a court could apply the holding to business entities in situations where an owner "possesses individual rights . . . sufficient to constitute 'property' or 'rights to property'" ¹¹⁴

A. Partnerships

A partnership is "an association of two or more persons to carry on as co-owners a business for profit." ¹¹⁵ The Uniform Partnership Act generally provides the law governing partnerships. ¹¹⁶ However,

¹¹³ *Id.* (Thomas, J., dissenting).

¹¹⁴ *Id.* at 1419.

¹¹⁵ UNIF. P'SHIP ACT § 101(6) (1997). One advantage of doing business as a partnership is the ease of formation. LEWIS D. SOLOMON ET AL., CORPORATIONS LAW AND POLICY 131 (4th ed. 1998).

Forming a general partnership . . . requires no filing with the state. A partnership may arise in two ways. The most common method is consensual formation. It occurs when two or more individuals enter into a contractual relationship, usually embodied in a partnership agreement which governs the the [sic] relationship of the partners, including such matters as managerial rights, distribution rights, interests in profits and losses, and rights upon dissolution of the enterprise [A] partnership may also arise by operation of law.

Id. Another advantage of doing business as a partnership is the avoidance of the double taxation of business income. *Id.* at 140-43.

A partnership . . . is considered an aggregate of individuals rather than a separate entity; hence, it is not a taxpayer. The partnership files an information return, but the purpose is essentially to determine how much tax the individual partners will pay on the income or loss attributable to them from the operation of the partnership. Both the income and expenses of the partnership are said to "flow-through" to the partners in proportion to their ownership interests.

Id. at 140.

¹¹⁶ 59A AM. JUR. 2D *Partnership* § 22 (2002) (noting that a version of the Uniform Partnership Act has been adopted with variations by all but one state). *See also* ALA. CODE §§ 10-8A-103 to 10-8A-1109 (2002); ALASKA STAT. §§ 32.05.010 to 32.05.430 (2002); ARIZ. REV. STAT. ANN. §§ 29-301 to 29-1105 (2003); ARK. CODE ANN. §§ 4-42-101 to 4-42-702 (Michie 2002) (repealed effective January 1, 2005); CAL. CORP. CODE §§ 16100-16962 (West 2003); COLO. REV. STAT. ANN. §§ 7-60-101 to 7-60-154 (West 2002); CONN. GEN. STAT. ANN. §§ 34-300 to 34-397 (West 2002); DEL. CODE ANN. tit. 6, §§ 15-101 to 15-210 (2002); FLA. STAT. ANN. §§ 620.81001 to 620.99002 (West 2002); GA. CODE ANN. §§ 14-8-1 to 14-8-64 (2002); HAW. REV. STAT. §§ 425-101 to 425-145 (2002); IDAHO CODE §§ 53-3-101 to 53-3-1205 (2002); 805 ILL. COMP. STAT. ANN. 205/1 to 205/43 (West 2002); IND. CODE ANN. §§ 23-4-1-1 to 23-4-1-52 (West 2002); IOWA CODE ANN. §§ 486A.101 to 486A.1302 (West 2002); KAN. STAT. ANN. §§ 56-1a105 to 56a-1101 (2001); KY. REV. STAT. ANN. §§ 362.150 to 362.360 (Banks-Baldwin 2002); ME. REV. STAT. ANN. tit. 31, §§ 281-323 (West 2002); MD. CODE ANN., CORPS. & ASS'NS §§ 9A-101 to 9A-1205 (2002); MASS. GEN. LAWS ANN. ch. 108A, §§ 1-44 (West 2003); MICH. COMP. LAWS ANN. §§ 449.1 to 449.48 (West 2003); MINN. STAT. ANN. §§ 323A.01-01 to 323A.12-03 (West 2003); MISS. CODE ANN. §§

partnerships are also regulated by common law and, because partnership agreements may alter the default provisions of the Uniform Partnership Act, by contract law.¹¹⁷

The *Craft* court identified first the right to use property as a right that, when combined with other individual property rights, could allow a federal tax lien to reach entireties property.¹¹⁸ The Uniform Partnership Act provides the right for partners to use partnership property.¹¹⁹ However, the right is limited to use for partnership purposes and is subject to the terms of the partnership agreement.¹²⁰

The *Craft* court then considered the right to exclude third parties from property.¹²¹ The Uniform Partnership Act does not include the right to exclude in its provisions relating to the extent and nature of a partner's property rights.¹²² However, in *Mississippi Valley Title Ins. Co. v. Malkove*,¹²³ the Supreme Court of Alabama set forth the

79-12-1 to 79-12-119 (2003); MO. ANN. STAT. §§ 358.010 to 358.510 (West 2002); MONT. CODE ANN. §§ 35-10-101 to 35-10-710 (2003); NEB. REV. STAT. §§ 67-401 to 67-467 (2003); NEV. REV. STAT. §§ 87.010 to 87.560 (2002); N.H. REV. STAT. ANN. §§ 304-A:1 to 304-A:43 (2002); N.J. STAT. ANN. §§ 42:1A-1 to 42:1A-56, 42:1A-59 (West 2003); N.M. STAT. ANN. §§ 54-1A-101 to 54-1A-1206 (Michie 2002); N.Y. PARTNERSHIP LAW §§ 1 to 74, 121-1500 to 121-1503 (McKinney 2002); N.C. GEN. STAT. §§ 59-31 to 59-73 (2002); N.D. CENT. CODE §§ 45-13-01 to 45-21-08 (2001); OHIO REV. CODE ANN. §§ 1775.01 to 1775.63 (West 2002); OKLA. STAT. ANN. tit. 54, §§ 201-43 (West 2002); OR. REV. STAT. §§ 67.005 to 67.810 (2001); 15 PA. CONS. STAT. ANN. §§ 8301-8365 (West 2003); R.I. GEN. LAWS §§ 7-12-12 to 7-12-55 (2002); S.C. CODE ANN. §§ 33-41-10 to 33-41-1220 (Law. Co-op. 2002); S.D. CODIFIED LAWS §§ 48-7A-103 to 48-7A-1101 (Michie 2002); TENN. CODE ANN. §§ 61-1-101 to 61-1-147 (2002); TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 1.01 to 11.04 (Vernon 2002); UTAH CODE ANN. §§ 48-1-1 to 48-1-48 (2002); VT. STAT. ANN. tit. 11, §§ 3201-3313 (2002); VA. CODE ANN. §§ 50-73.79 to 50-73.149 (Michie 2003); WASH. REV. CODE ANN. §§ 25.05.013 to 25.05.550 (West 2003); W. VA. CODE §§ 47B-1-1 to 47B-11-5 (2002); WIS. STAT. ANN. §§ 178.01 to 178.39 (West 2003); WYO. STAT. ANN. §§ 17-21-101 to 17-21-1003 (Michie 2002).

117 59A AM. JUR. 2D *Partnership* § 22 (2002).

118 *United States v. Craft*, 122 S. Ct. at 1422.

119 UNIF. P'SHIP ACT § 25(2)(a) (1914). See also *Putnam v. Shoaf*, 620 S.W.2d 510 (Tenn. Ct. App. 1981) (holding that a partner's individual rights to partnership property includes the right of equal use and possession for partnership purposes); *Mfrs. Bldg., Inc. v. Heller*, 235 N.W.2d 825 (Minn. 1975) (holding that each partner in a partnership which owned an office building had a right to use the building as a depository). Cf. *Darden v. Cox*, 137 So. 2d 898 (La. Ct. App. 1962) (holding that a partner may not use partnership property for private use without compensating the other partners).

120 UNIF. P'SHIP ACT § 25(2)(a) (1914). The Act provides that "[a] partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes." UNIF. P'SHIP ACT § 25(2)(a) (1914) (emphasis added). However, partners may consent to a partner's use of partnership property for non-partnership purposes. UNIF. P'SHIP ACT § 25(2)(a) (1914).

121 *Craft*, 122 S. Ct. at 1422.

122 See UNIF. P'SHIP ACT §§ 24-25 (1914).

123 *Mississippi Valley Title Ins. Co. v. Malkove*, 540 So. 2d 674 (Ala. 1988). In *Mississippi Valley Title Insurance Co.*, Bernard and Melvin Malkove purchased title insurance on real property

partnership's right to exclude others from using partnership property.¹²⁴ The court noted that the right to exclude belonged to the partnership entity rather than to the partners individually.¹²⁵ Therefore, partners have the right to exclude third parties from partnership property only while acting on behalf of the partnership.¹²⁶

Next, the *Craft* court identified the individual right to a share of income produced from property.¹²⁷ The Uniform Partnership Act requires partners to share the income produced from partnership property along with a corresponding duty to share equally in partnership losses.¹²⁸ In fact, "receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business."¹²⁹ Additionally, when a partnership is terminated, partners share any profits remaining after the payment of partnership liabilities.¹³⁰

Then the *Craft* court identified the right of survivorship.¹³¹ Under the Uniform Partnership Act, the death of a partner results in the dissolution of the partnership.¹³² The Uniform Partnership Act defines dissolution of a partnership as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on [of

owned individually. *Id.* at 680. The issue was whether the title insurance policy remained effective when the Malkove brothers subsequently conveyed the property to a partnership. *Id.* The Alabama Supreme Court affirmed the lower court's decision permitting the Malkoves to collect proceeds from the policy. *Id.* at 678.

124 *Id.* at 681.

125 *Id.*

126 See UNIF. P'SHIP ACT § 18(e) (1914) (giving all partners "equal rights in the management and conduct of the partnership business"); UNIF. P'SHIP ACT § 24 (1914) (identifying the right to participate in management as a property right of each partner).

127 United States v. *Craft*, 122 S. Ct. 1414, 1422 (2002).

128 UNIF. P'SHIP ACT § 18(a) (1914).

Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

UNIF. P'SHIP ACT § 18(a) (1914). See also UNIF. P'SHIP ACT § 26 (1914) (indicating that "[a] partner's interest in the partnership is his share of profits and surplus").

129 UNIF. P'SHIP ACT § 7 (1914).

130 UNIF. P'SHIP ACT § 40 (1914).

The liabilities of the partnership shall rank in order of payment, as follows: I. Those owing to creditors other than partners, II. Those owing to partners other than for capital and profits, III. Those owing to partners in respect of capital, IV. Those owing to partners in respect of profits.

UNIF. P'SHIP ACT § 40(b) (1914).

131 *Craft*, 122 S. Ct. at 1422.

132 UNIF. P'SHIP ACT § 31 (1914).

partnership business].”¹³³

When dissolution occurs, the remaining partners must choose whether to continue carrying on the business by forming a new partnership or to wind up the business.¹³⁴ If they choose to wind up the old partnership, the partnership property is used to pay partnership liabilities and any remainder is distributed to the partners as profits.¹³⁵ If they choose to carry on the business in a new partnership, the estate of the deceased partner is entitled to the value of his interest in the partnership plus interest or a share of the profits generated by the assets of the dissolved partnership.¹³⁶

Therefore, the method by which a partnership may succeed to a deceased partner’s rights to partnership property is the functional equivalent to the right of survivorship. Additionally, the applicable provisions of the Uniform Partnership Act are default provisions; partners could specifically agree to give each other rights of survivorship in their partnership agreement.¹³⁷ Furthermore, some states explicitly provide the right of survivorship to partnerships by statute.¹³⁸

133 UNIF. P’SHP ACT § 29 (1914).

134 See UNIF. P’SHP ACT § 37 (1914) (providing that “[u]nless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs”); UNIF. P’SHP ACT §§ 41-42 (1914) (containing provisions regarding the continuation of partnership business after dissolution).

135 See UNIF. P’SHP ACT § 40 (1914) (setting forth the rules for distribution of partnership assets upon distribution).

136 UNIF. P’SHP ACT § 42 (1914).

When any partner retires or dies, and the business is continued . . . without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed , he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership. . . .

UNIF. P’SHP ACT § 42 (1914).

137 UNIF. P’SHP ACT §§ 37, 42 (1914). Section 37 provides that “*Unless otherwise agreed the partners who have . . .*” UNIF. P’SHP ACT § 37 (1914) (emphasis added). Section 42 provides that “the person or partnership continuing the business, *unless otherwise agreed . . .*” UNIF. P’SHP ACT § 42 (1914) (emphasis added).

138 E.g. N.C. GEN. STAT. § 41-2 (2000).

[E]states held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors and administrators respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according

Then the *Craft* court identified the right to become a tenant in common with equal shares upon divorce.¹³⁹ Divorce, like death, has the effect of terminating a marriage.¹⁴⁰ Therefore, a court would analyze again the effects of partnership dissolution to identify a similar property right in the partnership context.¹⁴¹

A court also might consider the effects of partnership dissolution when the dissolution occurs in contravention of the partnership agreement.¹⁴² Section 38 of the Uniform Partnership Act contains the rights of partners involved in a wrongful dissolution.¹⁴³ The rights of the remaining partners are essentially the same as if the dissolution were permitted except that the remaining partners are also entitled to damages from the partner who wrongfully caused the dissolution.¹⁴⁴

Then the *Craft* court identified the right to sell the property with the other spouse's consent and to receive a share of the proceeds from such a sale.¹⁴⁵ A partner's right to unilaterally sell property varies depending upon whether the transaction falls within the ordinary course of partnership business.¹⁴⁶ If the transaction falls within the ordinary course of business, a partner's act binds the partnership unless the third party knows that the partner does not have authority to complete the transaction.¹⁴⁷ If the transaction does not fall within the ordinary course

to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners.

N.C. GEN. STAT. § 41-2 (2000).

¹³⁹ *Craft*, 122 S. Ct. at 1422.

¹⁴⁰ See BLACK'S LAW DICTIONARY 494 (7th ed. 1999). Divorce is the "legal dissolution of a marriage by a court." *Id.*

¹⁴¹ See *supra* notes 132 through 138 and accompanying text.

¹⁴² See UNIF. P'SHIP ACT § 31 (1914) (indicating that "[d]issolution is caused . . . [i]n contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time"). Dissolution is permitted when the partnership terminates under the terms of the partnership agreement, when any partner expressly wills termination absent terms in the partnership agreement, when all partners expressly agree to the termination, when a partner is appropriately expelled from the partnership, when it becomes unlawful to carry on the partnership business, when a partner dies or becomes bankrupt, or when a court decrees dissolution of the partnership. UNIF. P'SHIP ACT § 31 (1914).

¹⁴³ UNIF. P'SHIP ACT § 38 (1914).

¹⁴⁴ Compare UNIF. P'SHIP ACT § 38 (1914), with UNIF. P'SHIP ACT §§ 37, 42 (1914).

¹⁴⁵ *United States v. Craft*, 122 S. Ct. 1414, 1422 (2002).

¹⁴⁶ See UNIF. P'SHIP ACT § 301 (1997).

¹⁴⁷ UNIF. P'SHIP ACT § 301 (1997).

An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course of the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the

of business, a partner's act binds the partnership only if the partner has actual authority from the other partners to complete the transaction.¹⁴⁸

Additionally, a partner's right to sell partnership property may be spelled out in a statement of partnership authority.¹⁴⁹ A third party without knowledge to the contrary generally can rely upon such a statement when transacting with a partner, unless the transaction involves real property.¹⁵⁰ If the transaction involves the transfer of title to real property, a third party generally can rely upon a statement of partnership authority unless a subsequent statement limiting the original is on file.¹⁵¹

Thus, in many circumstances, a partner will have the authority, by agreement or by statute, to unilaterally sell partnership property.¹⁵² When this occurs, the partner is entitled to a proportionate share of the profits or losses resulting from the sale of property.¹⁵³ Therefore, partners will frequently have rights equivalent to those of tenants by the

partner was dealing knew or had received a notification that the partner lacked authority.
UNIF. P'SHIP ACT § 301 (1997).

148 UNIF. P'SHIP ACT § 301 (1997). "An act of a partner which is not apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by the other partners." UNIF. P'SHIP ACT § 301 (1997).

149 See UNIF. P'SHIP ACT § 303 (1997) (noting that "[a] partnership may file a statement of authority, which . . . may state the authority, or limitations on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership and any other matter").

150 UNIF. P'SHIP ACT § 303(d)(1) (1997).

Except for transfers of real property, a grant of authority contained in a filed statement of partnership authority is conclusive in favor of a person who gives value without knowledge to the contrary, so long as and to the extent that a limitation on that authority is not then contained in another filed statement. A filed cancellation of a limitation on authority revives the previous grant of authority.

UNIF. P'SHIP ACT § 303(d)(1) (1997).

151 UNIF. P'SHIP ACT § 303 (1997).

A grant of authority to transfer real property held in the name of the partnership contained in a certified copy of a filed statement of partnership authority recorded in the office for recording transfers of that real property is conclusive in favor of a person who gives value without knowledge to the contrary, so long as and to the extent that a certified copy of a filed statement containing a limitation on that authority is not then of record in the office for recording transfers of that real property. . . . A person not a partner is deemed to know of a limitation on the authority of a partner to transfer real property held in the name of the partnership if a certified copy of the filed statement containing the limitation on authority is of record in the office for recording transfers of that real property.

UNIF. P'SHIP ACT § 303 (1997).

152 See *supra* notes 145 through 151 and accompanying text.

153 UNIF. P'SHIP ACT § 401(b) (1997) (providing that "[e]ach partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits").

entirety to sell property and share in the proceeds.

The *Craft* court identified next the ability of a tenant by the entirety to place an encumbrance on the property with the other tenant's consent.¹⁵⁴ A court attempting to determine whether a partner had an equivalent right to encumber property on behalf of a partnership would analyze the partner's authority to enter into such transactions as discussed above.¹⁵⁵

A partner also has the ability to assign his individual property rights.¹⁵⁶ "The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in management."¹⁵⁷ However, "[a] partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property."¹⁵⁸ Additionally, an assignee of a partner's interest cannot participate in the management of the partnership.¹⁵⁹ Thus, in effect, an assignment conveys only the partner's interest to share in profits.¹⁶⁰ Therefore, partners have a limited ability to encumber their personal rights to partnership property and will frequently have the ability to encumber the property on behalf of the partnership.¹⁶¹

Finally, the *Craft* court identified the right of tenants by the entirety to block their co-tenants from unilaterally selling or encumbering the property.¹⁶² A partner can prevent another partner from selling or encumbering partnership property in the ordinary course of business by notifying the other party to the transaction that the partner is not

154 United States v. Craft, 122 S. Ct. 1414, 1422 (2002).

155 See *supra* notes 145 through 152 and accompanying text.

156 See UNIF. P'SHIP ACT § 27 (1914).

157 UNIF. P'SHIP ACT § 24 (1914).

158 UNIF. P'SHIP ACT § 25(2) (b) (1914).

159 UNIF. P'SHIP ACT § 27(1) (1914). The Act explains,

A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of an agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books. . . .

Id.

160 UNIF. P'SHIP ACT § 27(1) (1914). The Act explains,

A conveyance by a partner of his interest in the partnership . . . merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

UNIF. P'SHIP ACT § 27 (1914).

161 See *supra* notes 155 through 160 and accompanying text.

162 United States v. Craft, 122 S. Ct. 1414, 1422 (2002).

authorized to bind the partnership.¹⁶³ A partner can prevent another partner from selling or encumbering partnership property in transactions outside the ordinary course of business simply by failing to authorize the other partner to bind the partnership.¹⁶⁴

In addition to the “ordinary course of business” provision, partners can demonstrate their authority to bind partnerships with statements of partnership authority.¹⁶⁵ If a partnership has only two partners, either partner can prevent the other from selling or encumbering partnership property in this way by refusing to sign the statement of partnership authority.¹⁶⁶ Also, a partner can counter an executed and filed statement of partnership authority by filing a statement of denial.¹⁶⁷ Thus, partners generally have the ability to block other partners from unilaterally selling or encumbering partnership property.¹⁶⁸

In *Craft*, the U.S. Supreme Court held that tenants by the entirety have sufficient individual rights to property to cause the property to fall within the reach of federal tax liens.¹⁶⁹ In many circumstances, partners possess the same individual rights to partnership property that the Court identified with tenants by the entirety, suggesting the possibility that the Internal Revenue Service could attempt to place liens on partnership

163 UNIF. P'SHIP ACT § 301 (1997).

An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner is dealing knew or *had received a notification that the partner lacked authority*.

UNIF. P'SHIP ACT § 301 (1997) (emphasis added). *But see* UNIF. P'SHIP ACT § 401(j) (1997) (indicating that a majority of the partners must agree to withhold authority when the transaction is within the ordinary course of business).

164 UNIF. P'SHIP ACT § 301 (1997). “An act of a partner which is not apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership *only if the act was authorized by the other partners*.” *Id.* (emphasis added). *See also* UNIF. P'SHIP ACT § 301 (1997) (indicating that “[a]n act outside the ordinary course of business of a partnership . . . may be undertaken only with the consent of all of the partners”).

165 *See* UNIF. P'SHIP ACT § 303 (1997).

166 *See* UNIF. P'SHIP ACT § 105(c) (1997) (requiring the signatures of at least two partners for any statement filed on behalf of a partnership).

167 *See* UNIF. P'SHIP ACT § 304 (1997).

A partner or other person named as a partner in a filed statement of partnership authority or in a list maintained by an agent pursuant to Section 303(b) may file a statement of denial stating the name of the partnership and the fact that is being denied, which may include denial of a person's authority or status as a partner. A statement of denial is a limitation on authority as provided in Section 303(d) and (e).

UNIF. P'SHIP ACT § 304 (1997).

168 *See supra* notes 163 through 167 and accompanying text.

169 *United States v. Craft*, 122 S. Ct. 1414, 1425 (2002).

property to collect tax debts owed by partners individually.¹⁷⁰ Justice O'Connor attempts to allay such fears by noting that federal tax liens, in accordance with state law, attach only to a partnership's interest in the partnership.¹⁷¹ Later in the opinion, however, Justice O'Connor proclaims that the federal collector is not bound by state laws applying to state-law creditors.¹⁷²

B. Limited Partnerships

A limited partnership is "a partnership formed by two or more persons . . . and having one or more general partners and one or more limited partners."¹⁷³ All fifty states have enacted statutes providing for

¹⁷⁰ See *supra* notes 118 through 168 and accompanying text.

¹⁷¹ *Craft*, 122 S. Ct. at 1424. "As a holder of this lien, the Federal Government is entitled to 'receive . . . the profits to which the assigning partner would otherwise be entitled,' including predissolution distributions and the proceeds from dissolution." *Id.* (quoting section 27 of the Uniform Partnership Act of 1914). See also 59A AM. JUR. 2D *Partnership* § 22 (2002) (noting that a version of the Uniform Partnership Act has been adopted with variations by all but one state).

¹⁷² *Craft*, 122 S. Ct. at 1425-26. Justice O'Connor explains,

We therefore conclude that respondent's husband's interest in the entireties property constituted "property" or "rights to property" for the purposes of the federal tax lien statute. We recognize that Michigan makes a different choice with respect to state law creditors: "[L]and held by husband and wife as tenants by entirety is not subject to levy under execution on judgment rendered against either husband or wife alone." *Sanford v. Bertrau*, 204 Mich. 244, 247, 169 N.W. 880, 881 (1918). But that by no means dictates our choice. The interpretation of 26 U.S.C. § 6321 is a federal question, and in answering that question we are in no way bound by state courts' answers to similar questions involving state law. As we elsewhere have held, " 'exempt status under state law does not bind the federal collector.'" *Drye v. United States*, 528 U.S. at 59, 120 S.Ct. 474. See also *Rodgers*, 461 U.S. at 701, 103 S.Ct. 2132 (clarifying that the Supremacy Clause "provides the underpinning for the Federal Government's right to sweep aside state-created exemptions").

Id.

¹⁷³ REVISED UNIF. LTD. P'SHIP ACT § 101(7) (amended 1985). A general partner is "a person who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement and named in the certificate of limited partnership as a general partner." REVISED UNIF. LTD. P'SHIP ACT § 101(5) (amended 1985). A limited partner is "a person who has been admitted to a limited partnership as a limited partner in accordance with the partnership agreement." REVISED UNIF. LTD. P'SHIP ACT § 101(6) (amended 1985). Limited liability is an advantage to doing business as a limited partnership. SOLOMON ET AL., *supra* note 115 at 130.

In a limited partnership, a limited partner has no voice in the active management of the partnership, which is conducted by the general partner Additionally, the limited partner's liability is limited to her initial contribution to the partnership, while the general partner is subject to unlimited liability.

Id. Another advantage is the increased ability of the entity to raise capital. "Because of the limited liability protections afforded to limited partners and the tax advantages . . . the limited partnership is an easier vehicle for raising capital than is the general partnership. Accordingly, it is often the form used in large enterprises organized as partnerships." *Id.* at 136.

limited partnerships.¹⁷⁴ The Uniform Limited Partnership Act and the Revised Uniform Limited Partnership Act generally provide the law governing limited partnerships.¹⁷⁵

Both of the uniform acts contain provisions indicating that general partners in limited partnerships generally have the same rights and powers as partners in partnerships without limited partners.¹⁷⁶ For this reason, courts likely would conclude that general partners in limited partnerships have the same rights to partnership property as partners in partnerships without limited partners.¹⁷⁷

Because limited partners do not actively participate in management, they have few of the property rights possessed by tenants by the entirety.¹⁷⁸ For example, neither uniform act provides limited partners with the right to use partnership property, the right to exclude third parties from partnership property, the right to sell partnership property, or the right to prevent other partners from selling or encumbering partnership property.¹⁷⁹ However, limited partners do have the right to share in the proceeds from the sale of property,¹⁸⁰ the right to receive

174 59A AM. JUR. 2D *Partnership* § 1233 (2002)

175 See 59A AM. JUR. 2D *Partnership* § 1233 (2002) (indicating that Alaska, Georgia, Hawaii, Indiana, Kentucky, Maine, Mississippi, Missouri, New Hampshire, New Mexico, New York, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, and Vermont have enacted the Uniform Limited Partnership Act with some variations, and that Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Virginia, Washington, West Virginia, Wisconsin, and Wyoming have enacted the Revised Uniform Limited Partnership Act with some variations).

176 See REVISED UNIF. LTD. P'SHIP ACT § 403 (amended 1985); UNIF. LTD. P'SHIP ACT § 9 (1916).

Except as provided in this Act or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners . . . has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners . . . [and] has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.

REVISED UNIF. LTD. P'SHIP ACT § 403 (amended 1985).

A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to . . .

UNIF. LTD. P'SHIP ACT § 9 (1916).

177 See *supra* notes 118 through 168 and accompanying text.

178 See REVISED UNIF. LTD. P'SHIP ACT § 305 (amended 1985) (enumerating the rights of limited partners); UNIF. LTD. P'SHIP ACT § 10 (1916) (specifying the rights of limited partners).

179 See REVISED UNIF. LTD. P'SHIP ACT § 305 (amended 1985) (specifying the rights of limited partners); UNIF. LTD. P'SHIP ACT § 10 (1916) (enumerating the rights of limited partners).

180 See REVISED UNIF. LTD. P'SHIP ACT § 503 (amended 1985) (providing that "[t]he profits

their share of partnership property at termination,¹⁸¹ and the right to encumber their interest in the partnership property.¹⁸²

Because limited partners possess few individual rights to partnership property, a court might be unlikely to apply the *Craft* holding to limited partners.¹⁸³ However, the *Craft* court reasoned that the combination of the right to receive income and the right to exclude others might be sufficient to qualify as property or rights to property.¹⁸⁴ Therefore, a court could combine a limited partner's right to receive income, a right to exclude others from partnership property found in either a partnership agreement or the common law, and the Court's reasoning to conclude that the Internal Revenue Service could place a lien on the assets of a limited partnership to collect delinquent taxes owed by a limited partner individually.¹⁸⁵

C. Limited Liability Companies

A limited liability company "is an unincorporated business organization that combines certain features of the corporate form with others more closely resembling general partnerships."¹⁸⁶ Many states

and losses of a limited partnership shall be allocated among the partners, and among classes of partners, in the manner provided in writing in the partnership agreement"); UNIF. LTD. P'SHIP ACT § 10(2) (1916) (providing that limited partners "shall have the right to receive a share of the profits or other compensation by way of income").

A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners.

UNIF. LTD. P'SHIP ACT § 15 (1916).

181 See REVISED UNIF. LTD. P'SHIP ACT § 804 (amended 1985) (indicating that during winding up partnership assets should be distributed to partners after paying creditors and other liabilities); UNIF. LTD. P'SHIP ACT § 10 (1916) (indicating that limited partners have priority over general partners in the settling of accounts).

182 See REVISED UNIF. LTD. P'SHIP ACT §§ 701-05 (amended 1985) (governing the assignment of partnership interests); UNIF. LTD. P'SHIP ACT § 19 (1916) (noting that a limited partner's interest is assignable).

183 See *supra* notes 178 through 182 and accompanying text.

184 United States v. *Craft*, 122 S. Ct. 1414, 1423 (2002).

185 See *id.*

186 WILLIAM A. KLEIN ET AL., AGENCY, PARTNERSHIPS, AND LIMITED LIABILITY ENTITIES 329 (2001).

It [the limited liability company] allows somewhat more flexibility than the corporation . . . in developing rules for management and control The LLC also offers advantageous tax treatment as compared with a corporation. A corporation pays tax on its profits as earned and the shareholders (the equity investors) pay a second tax when those profits are distributed to them. Investors in an LLC are taxed, like partners, only once on its profits, as those profits are earned. Moreover, the investors in an LLC

have enacted statutes providing for the limited liability company business entity.¹⁸⁷ Limited liability companies can be managed by their investors, called members, or by managers who need not be members.¹⁸⁸

Generally, members of manager-managed limited liability companies do not possess substantial rights to company property because they are not actively involved in management.¹⁸⁹ Likewise, the managers of such companies do not possess rights to company property because they are merely agents.¹⁹⁰ However, members of member-managed companies have substantial rights to company property.¹⁹¹

A court determining whether to extend the *Craft* holding to member-managers would first consider the member-managers' rights to use and exclude others from company property.¹⁹² Each member-manager has an equal right to participate in the company's management.¹⁹³ Managing the business would likely involve using and dealing with company property.¹⁹⁴ Additionally, managing the business might entail taking legal action to exclude others from company property.¹⁹⁵

Next a court would consider the member-manager's right to receive a share of the income produced by company property.¹⁹⁶ Members may establish their own distribution arrangements in an operating agreement.¹⁹⁷ If a company chooses to make distributions prior to

can take account, on their individual tax returns, of any losses of the LLC as those losses are incurred; the losses are said to "pass through." A corporation's losses can be carried forward to offset any future profits but cannot be used by its shareholders. In addition, the LLC allows greater freedom than a corporation in allocating profit and loss for tax purposes.

Id.

187 David M. Hastings, Annotation, *Construction and Application of Limited Liability Company Acts*, 79 A.L.R. 5th 689 (2000).

188 KLEIN ET AL., *supra* note 186 at 329.

189 See UNIF. LTD. LIAB. CO. ACT § 404 cmt. (1996).

190 UNIF. LTD. LIAB. CO. ACT § 301(b) (1996).

191 See, e.g., UNIF. LTD. LIAB. CO. ACT § 301(c) (1996) (noting that member-managers generally may bind the company in transactions involving real property).

192 See *United States v. Craft*, 122 S. Ct. 1414, 1422 (2002).

193 UNIF. LTD. LIAB. CO. ACT § 404(a)(1) (1996).

194 See UNIF. LTD. LIAB. CO. ACT § 112(b)(2) (1996) (authorizing limited liability companies to "purchase, receive, lease... and otherwise deal with real or personal property, or any legal or equitable interest in property, wherever located").

195 See UNIF. LTD. LIAB. CO. ACT § 112(b)(1) (1996) (including the power to bring suit among the powers provided for limited liability companies).

196 See *Craft*, 122 S. Ct. at 1422.

197 See UNIF. LTD. LIAB. CO. ACT § 103 (1996) (pertaining to operating agreements).

[A]ll members of a limited liability company may enter into an operating agreement, which need not be in writing, to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company. To

dissolution, however, the distributions must be made in equal shares.¹⁹⁸

Then a court would examine the member-manager's right to receive property upon dissolution of the company and upon the member's dissociation.¹⁹⁹ Members are entitled to share in any surplus remaining upon the winding up of business following dissolution.²⁰⁰ This is true even when a member's dissociation causes the dissolution.²⁰¹

Upon the dissociation of a member, the remaining members must choose to dissolve the company and wind up business or to purchase the dissociated member's distributional interest.²⁰² Unless the articles of organization specify a term of existence for the company, the company must purchase the dissociated member's distributional interest.²⁰³ A company must make a final distribution even to members who wrongfully dissociate; however, the company may offset an amount equivalent to damages it has sustained.²⁰⁴ Therefore, a member-manager is entitled to receive a share of company property when his relationship with the company ends regardless of the circumstances.²⁰⁵

A court would then consider the member-manager's right to sell company property with the consent of the other members and to receive a share of the proceeds from such a sale.²⁰⁶ Member-managers generally

the extent the operating agreement does not otherwise provide, this [Act] governs relations among the members, managers, and company.

UNIF. LTD. LIAB. CO. ACT § 103(a) (1996). *See also* UNIF. LTD. LIAB. CO. ACT § 103(b) (1995) (discussing limitations upon the effect of operating agreements).

198 UNIF. LTD. LIAB. CO. ACT § 405(a) (1996).

199 *See Craft*, 122 S. Ct. at 1422.

200 UNIF. LTD. LIAB. CO. ACT § 806 (1996).

In winding up a limited liability company's business, the assets of the company must be applied to discharge its obligations to creditors, including members who are creditors. Any surplus must be applied to pay in money the net amount distributable to members in accordance with their right to distributions . . . Each member is entitled to a distribution upon the winding up of the limited liability company's business consisting of a return of all contributions which have not previously been returned and a distribution of any remainder in equal shares.

UNIF. LTD. LIAB. CO. ACT § 806 (1996).

201 UNIF. LTD. LIAB. CO. ACT § 603 (1996). "The term 'dissociation' refers to the change in relationships among the dissociated member, the company and the other members caused by a member's ceasing to be associated in the carrying on of the company's business." UNIF. LTD. LIAB. CO. ACT § 601 cmt. (1995). *See also* UNIF. LTD. LIAB. CO. ACT § 601 (1995) (enumerating the events which will cause a member's dissociation).

202 UNIF. LTD. LIAB. CO. ACT § 603(a) (1996). *See also* UNIF. LTD. LIAB. CO. ACT § 701 (1995) (containing default rules for a limited liability company's purchase of a distributional interest).

203 UNIF. LTD. LIAB. CO. ACT § 603(a) (1996).

204 UNIF. LTD. LIAB. CO. ACT § 602 (1996).

205 *See supra* notes 199 through 204 and accompanying text.

206 *See United States v. Craft*, 122 S. Ct. 1414, 1422 (2002).

have the right to bind companies in transactions entered into in the ordinary course of business.²⁰⁷ This is true even in transactions involving real property, unless the members' authority is explicitly limited in the articles of organization.²⁰⁸ Member-managers can bind companies in transactions not within the ordinary course of business with the consent of the other members.²⁰⁹ Members share in the profit resulting from such transactions as discussed above.²¹⁰

A court would consider next the member-manager's right to encumber company property with the other members' consent.²¹¹ Limited liability companies are generally authorized by statute to encumber their property.²¹² A member-manager generally has the authority to complete such a transaction on behalf of the company if the transaction falls within the ordinary course of business.²¹³ A member-manager can bind the company outside the ordinary course of business with the consent of the other members.²¹⁴

Although members have no transferable interest in company

207 UNIF. LTD. LIAB. CO. ACT § 301(a) (1996).

Each member is an agent of the limited liability company for the purpose of its business, and an act of a member, including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company, unless the member had no authority to act for the company in the particular matter and the person with whom the member was dealing knew or had notice that the member lacked authority.

UNIF. LTD. LIAB. CO. ACT § 301(a) (1996).

208 UNIF. LTD. LIAB. CO. ACT § 301(c) (1996).

Unless the articles of organization limit their authority, any member of a member-managed company or manager of a manager-managed company may sign and deliver any instrument transferring or affecting the company's interest in real property. The instrument is conclusive in favor of a person who gives value without knowledge of the lack of authority of the person signing and delivering the instrument.

UNIF. LTD. LIAB. CO. ACT § 301(c) (1996).

209 UNIF. LTD. LIAB. CO. ACT § 301(a) (1996). "An act of a member which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized by the other members." UNIF. LTD. LIAB. CO. ACT § 301(a) (1996).

210 See *supra* notes 196 through 205 and accompanying text.

211 See *Craft*, 122 S. Ct. at 1422.

212 UNIF. LTD. LIAB. CO. ACT § 112(b)(5) (1996). Limited liability companies have the power to:

Make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, which may be convertible into or include the option to purchase other securities of the limited liability company, and secure any of its obligations by a mortgage on or a security interest in any of its property, franchises, or income.

UNIF. LTD. LIAB. CO. ACT § 112(b)(5) (1996).

213 UNIF. LTD. LIAB. CO. ACT § 301(a) (1996).

214 UNIF. LTD. LIAB. CO. ACT § 301(a) (1996).

property,²¹⁵ members do have the right to transfer their distributional interests in the company.²¹⁶ A transferee generally takes no rights other than the right to receive distributions.²¹⁷ However, the transferee may become a member if so stated in the operating agreement and the other members consent.²¹⁸ Consequently, member-managers generally have the right to encumber company property, on behalf of the company, and have a limited right to do so individually.²¹⁹

Lastly, a court would consider a member-manager's right to prevent other members from unilaterally selling or encumbering company property.²²⁰ Selling and encumbering property does not require the unanimous consent of the company's members.²²¹ For this reason, a member-manager would need the support of a majority of the members to challenge such a transaction.²²² The majority could block a transaction outside the ordinary course of business simply by withholding their authority.²²³ If the transaction was within the ordinary course of business, the majority also would need to provide notice to the third party.²²⁴

Blocking a transaction that involves the selling or encumbering of real property is more problematic.²²⁵ Member-managers are authorized to enter such transactions unless the articles of organization limit their authority to do so.²²⁶ If the authority is limited, an objecting member

215 UNIF. LTD. LIAB. CO. ACT § 501(a) (1996).

216 UNIF. LTD. LIAB. CO. ACT § 501(b) (1996).

217 UNIF. LTD. LIAB. CO. ACT § 502 (1996). "A transfer of a distributional right does not entitle the transferee to become or to exercise any rights of a member. A transfer entitles the transferee to receive, to the extent transferred, only the distributions to which the transferor would be entitled." UNIF. LTD. LIAB. CO. ACT § 502 (1996).

218 UNIF. LTD. LIAB. CO. ACT § 503(a) (1996).

219 See *supra* notes 211 through 218 and accompanying text.

220 See *United States v. Craft*, 122 S. Ct. 1414, 1422 (2002).

221 See UNIF. LTD. LIAB. CO. ACT § 404(c) (1996). However, unanimous consent is required if the transaction would result in the violation of a duty of loyalty or would involve substantially all of the company's property. UNIF. LTD. LIAB. CO. ACT §§ 404(c)(2), 404(c)(12) (1996).

222 UNIF. LTD. LIAB. CO. ACT § 404(a)(2) (1996) (indicating that any business matter not requiring unanimous consent may be decided by a majority of the company's members).

223 UNIF. LTD. LIAB. CO. ACT § 301(a)(2) (1996) (requiring a transaction outside the ordinary course of business to be authorized by the other members).

224 UNIF. LTD. LIAB. CO. ACT § 301(a)(1) (1996) (noting that the company is bound in such transactions "unless the member had no authority to act for the company in the particular matter and the person with whom the member was dealing knew or had notice that the member lacked authority").

225 See generally UNIF. LTD. LIAB. CO. ACT § 301(c) (1996) (discussing members' authority to bind companies in transactions involving real property).

226 UNIF. LTD. LIAB. CO. ACT § 301(c) (1996).

Unless the articles of organization limit their authority, any member of a member-managed company or manager of a manager-managed company may sign and deliver

can prevent the transaction simply by providing notice to the third party.²²⁷ If the authority is not limited, the objecting member can prevent the transaction only by amending the articles of organization.²²⁸ Amending the articles of organization requires unanimous consent of the members, however, and the party attempting to complete the transaction presumably would not consent to the amendment.²²⁹

In *Craft*, the U.S. Supreme Court held that tenants by the entirety have sufficient individual rights to property for federal tax liens against just one tenant to reach the property.²³⁰ Because member-managers of limited liability companies have essentially the same rights to company property that tenants have to entireties property, the Internal Revenue Service could, in reliance on *Craft*, place liens upon company property to collect delinquent taxes owed individually by a member-manager.²³¹

D. Closely Held Corporations

Corporations are collective business entities created under state law.²³² The Model Business Corporation Act is the basis for corporation law in the majority of states.²³³ Shareholders, the owners of corporations, generally do not manage the corporation's business.²³⁴ A board of directors maintains responsibility for management of the corporation, which is carried out by the officers.²³⁵ Closely held

any instrument transferring or affecting the company's interest in real property. The instrument is conclusive in favor of a person who gives value without knowledge of the lack of authority of the person signing and delivering the instrument.

UNIF. LTD. LIAB. CO. ACT § 301(c) (1996).

227 UNIF. LTD. LIAB. CO. ACT § 301(c) (1996).

228 See UNIF. LTD. LIAB. CO. ACT § 301(c) (1996). See also UNIF. LTD. LIAB. CO. ACT § 204 (1996) (detailing the requirements and procedure for amending the articles of organization).

229 UNIF. LTD. LIAB. CO. ACT § 404(c)(3) (1995).

230 *United States v. Craft*, 122 S. Ct. 1414, 1426 (2002).

231 See *supra* notes 192 through 229 and accompanying text.

232 SOLOMON ET AL., *supra* note 115 at 130-31. The four basic attributes of corporations are centralized management, limited liability, transferability of ownership interests, and the fact that the corporation is a separate entity with perpetual existence. *Id.* at 1. See also MODEL BUS. CORP. ACT §§ 2.01 to 2.07 (1984) (providing a sample of statutory requirements for incorporation).

233 SOLOMON ET AL., *supra* note 115 at 35 (noting that thirty-five states have enacted statutes based upon the current or previous versions of the Model Business Corporation Act).

234 *Id.* at 35.

235 *Id.* at 35-36. See also MODEL BUS. CORP. ACT § 8.01 (1991) (setting forth requirements and duties for directors).

All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under section 7.32.

MODEL BUS. CORP. ACT § 8.01(b) (1991).

corporations generally have few shareholders, but the shareholders are actively involved in management.²³⁶ Frequently, in closely held corporations majority shareholders will serve also as directors and as officers.²³⁷

A court determining whether to extend the *Craft* holding to such shareholders in closely held corporations would first consider the shareholders' rights to use and exclude others from the corporations' property.²³⁸ The corporate bylaws specify the duties and authority of corporate officers.²³⁹ If the bylaws provided the rights at issue, the shareholder would have the rights simply by serving as an officer.²⁴⁰ If the bylaws did not provide the rights, the shareholder could amend the bylaws to do so.²⁴¹

Then the court would consider the shareholder's right to share in the income produced by corporate property.²⁴² Subject to limitations, "[a] board of directors may authorize, and the corporation may make distributions to its shareholders. . . ."²⁴³ Acting as the director, therefore, the shareholder could authorize distribution of the income.²⁴⁴

The court would next consider the shareholder's right to a share of the corporate property when the corporation dissolves.²⁴⁵ Shareholders may approve the voluntary dissolution of a corporation.²⁴⁶ Involuntary

236 SOLOMON ET AL., *supra* note 115 at 419-20. However, "there is no generally agreed-upon definition of a 'close corporation.'" *Id.* at 419. See also MODEL BUS. CORP. ACT § 7.32 (1984) (permitting shareholders to agree to less formal corporate structures including the elimination of the board of directors).

237 SOLOMON ET AL., *supra* note 115 at 36.

238 See *United States v. Craft*, 122 S. Ct. 1414, 1422 (2002).

239 MODEL BUS. CORP. ACT § 8.41 (1991). See also MODEL BUS. CORP. ACT § 2.06 (1991).

240 MODEL BUS. CORP. ACT § 8.41 (1991). See also MODEL BUS. CORP. ACT § 2.06 (1991).

241 MODEL BUS. CORP. ACT § 10.20(a) (1984).

The power to amend or repeal bylaws is shared by the board of directors and the shareholders, unless that power is reserved exclusively to the shareholders by an appropriate provision in the articles of incorporation. Section 10.20(b)(1) provides that the power to amend or repeal the bylaws may be reserved to the shareholders "in whole or in part."

MODEL BUS. CORP. ACT § 10.20 cmt. (1984).

242 See *Craft*, 122 S. Ct. at 1422.

243 MODEL BUS. CORP. ACT § 6.40 (1991). See also MODEL BUS. CORP. ACT § 6.40(c) (1991) (restricting distributions in limited circumstances).

244 MODEL BUS. CORP. ACT § 6.40 (1991).

245 See *Craft*, 122 S. Ct. at 1422.

246 MODEL BUS. CORP. ACT § 14.02 (1991).

For a proposal to dissolve to be adopted: (1) the board of directors must recommend dissolution to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders; and (2) the shareholders entitled to vote must approve the proposal to dissolve. . . .

dissolution can result from proceedings initiated by the secretary of state or attorney general.²⁴⁷ Shareholders share any corporate property remaining after the corporation has paid its creditors regardless of whether the dissolution was voluntary.²⁴⁸

The court would then consider the right to sell corporate property and to share in the proceeds of the sale.²⁴⁹ Directors and officers generally may sell corporate property in the ordinary course of business without first seeking shareholder approval.²⁵⁰ Moreover, a majority shareholder could authorize the sale in those circumstances in which shareholder consent is required.²⁵¹ The shareholder would share in the proceeds just as he would share in the income produced by the property.²⁵²

The court would then consider the majority shareholder's right to place an encumbrance on the property with the other shareholders' consent.²⁵³ Directors and officers have broad authority to encumber property.²⁵⁴ Unless their authority is restricted in the articles of incorporation, directors and officers may "encumber any or all of its [the corporation's] property, whether or not in the usual and regular course of business."²⁵⁵ If the authority is restricted, a majority shareholder could cause the corporation to amend the articles to allow for the encumbrance.²⁵⁶

MODEL BUS. CORP. ACT § 14.02(b) (1991).

247 See MODEL BUS. CORP. ACT § 14.20 (1991) (setting forth the grounds for administrative dissolution); MODEL BUS. CORP. ACT § 14.30 (1991) (setting forth the grounds for judicial dissolution).

248 See MODEL BUS. CORP. ACT § 14.05 (1991) (identifying the procedures for winding up and liquidating business at dissolution); MODEL BUS. CORP. ACT § 14.21(c) (1991) (indicating that section 14.05 is applicable in administrative dissolutions); MODEL BUS. CORP. ACT § 14.33 (1991) (authorizing courts to direct the winding up and liquidation pursuant to section 14.05).

249 See *Craft*, 122 S. Ct. at 1422.

250 MODEL BUS. CORP. ACT § 12.01 (1991).

251 See MODEL BUS. CORP. ACT § 12.02 (1991) (discussing dispositions that require shareholder approval).

252 See *supra* notes 242 through 244 and accompanying text.

253 See *Craft*, 122 S. Ct. at 1422.

254 See MODEL BUS. CORP. ACT § 12.01 (1991).

255 MODEL BUS. CORP. ACT § 12.01 (1991).

256 See MODEL BUS. CORP. ACT § 10.03 (1991) (setting forth the manner for amending articles of incorporation).

A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles of incorporation or to delete a provision that is not required in the articles of incorporation. Whether a provision is required or permitted in the articles is determined as of the effective date of the amendment.

MODEL BUS. CORP. ACT § 10.01(a) (1991).

Finally, the court would consider the shareholder's right to block other shareholders from selling or encumbering corporate property unilaterally.²⁵⁷ The board of directors is responsible for the exercise of corporate power and management of a corporation's business and affairs.²⁵⁸ A majority shareholder could thus prevent a sale or encumbrance of corporate property by electing only directors who would not consent to such a sale.²⁵⁹

In *Craft*, the U.S. Supreme Court held that tenants by the entirety have sufficient individual rights to property to cause the property to fall within the reach of federal tax liens.²⁶⁰ Majority shareholders in closely held corporations have essentially the same individual rights to corporate property as tenants have to entireties property.²⁶¹ Therefore, a court conceivably could extend the *Craft* holding to allow the Internal Revenue Service to place liens on corporate property to collect delinquent taxes from a majority shareholder.

V. CONCLUSION

In *United States v. Craft*, the U.S. Supreme Court determined that federal tax liens could reach property held as tenants by the entirety in situations where only one spouse had failed to pay delinquent federal taxes. The decision unnecessarily failed to follow the unanimous opinion of the lower federal courts and the consistent position of the Internal Revenue Service that entireties property was beyond the reach of the federal tax lien statute in those circumstances.

The Court decided instead to extend the line of cases where property and rights to property were not defined by state-law legal fictions to those situations where a taxpayer never possessed the property under state law. Unfortunately that decision will penalize families in which only one parent generates income. Also, the Court's reasoning could be extended to allow federal tax liens to reach property owned by partnerships, limited partnerships, limited liability companies, and closely held corporations, unfairly penalizing the innocent co-owners of these entities.

Wade M. Fisher

257 See *Craft*, 122 S. Ct. at 1422.

258 MODEL BUS. CORP. ACT § 8.01 (1991).

259 See MODEL BUS. CORP. ACT § 8.03(c) (1991) (noting that shareholders elect the directors). Presumably the majority shareholder could serve as the only director). See MODEL BUS. CORP. ACT § 8.03(a) (1984) (indicating that a board of directors may consist of only one person).

260 *Craft*, 122 S. Ct. at 1426.

261 See *supra* notes 232 through 259 and accompanying text.